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NOTES.

DISCHARGE OF A MORTGAGOR BY AN EXTENSION AGREEMENT BETWEEN THE MORTGAGEE AND THE GRANTEE OF THE MORTGAGED PREMISES.—Few more interesting situations are to be found in the law of mortgages than those which arise after a transfer of the mortgaged premises, whether the grantee assumes payment of the mortgage debt or not. In the latter case it is well recognized that after the mortgaged premises have passed to the grantee the land has become a primary fund for the payment of the debt and the mortgagor has assumed somewhat the rights and liabilities of a surety.¹ Although the grantee of the land is under no personal liability whatsoever,² and hence cannot in strictness be said to be a principal debtor, he must hold

¹Murray v. Marshall (1884) 94 N. Y. 611.

²Chilton v. Brooks (1890) 72 Md. 554.

his property subject to the possibility of its being seized upon to satisfy the mortgage.³ The question then arises whether a binding agreement between the grantee and the mortgagee, by which the time of the mortgage is extended, will discharge the mortgagor as surety, and if so, to what extent. It has been held that the mortgagor cannot be thus divested of his liability, because, since the grantee is not personally liable, there is no principle debtor and hence no relation of suretyship.⁴ The better view, however, would seem to be that a relation of at least quasi-suretyship exists, in which the land is principal debtor and the mortgagor is surety.⁵ The mortgagor has a right to be subrogated to the claim of the mortgagee against the land, and this right is substantially impaired by a valid agreement extending the time of the mortgage.⁶ Therefore such an agreement should discharge the mortgagor's liability to the extent of the value of the land at the time the mortgage was originally due.⁷ But the mortgagor is not a surety in the strict and technical sense, and an extension by the mortgagee should discharge him only to the extent he is damaged by the change, and not absolutely, as would result from an application of strict rules of suretyship.⁸

The recent case of *Union Bank of Brooklyn v. Rubinstein* (N. Y. 1912) 138 N. Y. Supp. 644 affords an illustration of the application of the foregoing principles. In that case premises were purchased subject to a first and second mortgage, neither of which were assumed by the grantee. The latter subsequently entered into an agreement with the first and second mortgagees by which the first mortgage was increased in amount. In an action to foreclose the second mortgage and to secure a deficiency judgment against the mortgagor it was held that the latter was discharged by such agreement only to the extent of the increase in the first mortgage, since his right of subrogation had been impaired only to that amount.

What is perhaps a more difficult situation is presented in cases where the grantee of the mortgaged land assumes payment of the debt. In such a case it is universally held that as between the mortgagor and his grantee the relation of principal and surety has arisen,⁹ the latter being then regarded as principal debtor and the former as a mere surety. The question whether the mortgagee is bound to respect this new relation has proved extremely troublesome, and while it is generally held on one theory or another that he may hold either the mortgagor or his grantee liable for the debt,¹⁰ there seems to be an irreconcilable conflict of authority when the question at issue is whether the mortgagor would be entirely discharged by an agreement between the mortgagee and the grantee extending the time for payment of the

³*Murray v. Marshall supra.*

⁴*Sheppard v. May* (1885) 115 U. S. 505; *Chilton v. Brooks supra.*

⁵*Murray v. Marshall supra.*

⁶*Travers v. Dorr* (1895) 60 Minn. 173; *Murray v. Marshall supra.*

⁷*Travers v. Dorr supra.*

⁸*Murray v. Marshall supra.*

⁹*See Iowa Loan & Trust Co. v. Hallers* (1903) 119 Ia. 645; *University v. Manning* (1901) 65 Oh. St. 138.

¹⁰*Crawford v. Edward* (1876) 33 Mich. 354; *Burr v. Beers* (1861) 24 N. Y. 178; *Enos v. Sanger* (1897) 96 Wis. 150; see *Woodcock v. Bostic* (1896) 118 N. C. 822.

mortgage.¹¹ It has been suggested that the solution of the problem depends upon the theory under which the mortgagee is permitted to sue the grantee of the land.¹²

In some jurisdictions the mortgagee may sue the mortgagor's grantee only in equity, upon the theory that he is subrogated to the rights of the mortgagor¹³ in order to avoid circuity of action.¹⁴ By this view there is in fact no relation of suretyship existent as to the mortgagee, for the grantee cannot be a principal debtor if the mortgagee has no direct legal right against him,¹⁵ and the relation between the mortgagor and the grantee is therefore one of indemnity rather than of suretyship.¹⁶ Hence it is clear that an extension agreement between the mortgagee and the grantee cannot operate to entirely discharge the mortgagor.¹⁷ In other States the mortgagee is allowed to sue the grantee of the land directly at law.¹⁸ This rule follows the doctrine of the now famous decision of *Lawrence v. Fox*,¹⁹ giving to him for whose benefit a contract is made the right to sue on it.²⁰ Here it seems clear that the principles of suretyship may well be applicable, since the creditor is enabled to sue the grantee in his own right; and it would flow from this result that any agreement between the two extending the time of the mortgage without the mortgagor's consent would operate to entirely discharge the latter.²¹ This distinction, based on the nature of the mortgagee's right against the grantee of the land, seems to be sound, and would serve to explain away much of the apparent conflict as to the position occupied by the mortgagor, but there are a considerable number of cases which have failed to apply it. Even in those jurisdictions where a grantee who has assumed the mortgage is not regarded as a principal debtor, however, it would seem that the mortgagee's primary right should be against the land and hence an extension agreement should discharge the mortgagor to the extent of the value of the land.²²

¹¹See *Iowa Loan & Trust Co. v. Hallers supra*; *Boardman v. Larrabee* (1883) 51 Conn. 39; *Brousseau v. Lowry* (1904) 209 Ill. 405; *Calvo v. Davies* (1878) 73 N. Y. 215.

¹²*Pratt v. Conway* (1898) 148 Mo. 291; *Union Life Ins. Co. v. Hanford* (1891) 143 U. S. 187.

¹³*Keller v. Ashforth* (1889) 133 U. S. 610; *Klapworth v. Dressler* (1860) 13 N. J. Eq. 62.

¹⁴*Biddle v. Pugh* (1900) 59 N. J. Eq. 480.

¹⁵*University v. Manning supra*; *Iowa Loan & Trust Co. v. Hallers supra*; *Boardman v. Larrabee supra*; see *Sheppard v. May supra*.

¹⁶*Trust & Loan Co. v. McKenzie* (1897) 23 Ont. App. 167.

¹⁷*Teeters v. Lamborn* (1885) 43 Oh. St. 144; *Iowa Loan & Trust Co. v. Hallers supra*.

¹⁸*Stevenson v. Elliott* (1894) 53 Kan. 550; *Webster v. Fleming* (1899) 178 Ill. 140.

¹⁹(1859) 20 N. Y. 258.

²⁰*Burr v. Beers supra*; *Wager v. Link* (1892) 134 N. Y. 122; *Webster v. Fleming supra*; *Enos v. Sanger supra*.

²¹*Union Life Ins. Co. v. Hanford supra*; *Pratt v. Conway supra*; *Calvo v. Davies supra*; *Hurd v. Tuohy* (1901) 133 Cal. 55; *George v. Andrews* (1882) 60 Md. 26.

²²*Trust & Loan Co. v. McKenzie supra*.